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OVERNIGHT MAIL

January 26, 2021

Jane Nishida
Acting Administrator
US Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Notice of Intent to File Suit to Compel EPA to Perform Non-Discretionary Act under Section 6(b) of TSCA

Dear Acting Administrator Nishida:

This is a notice of intent to sue under section 20(a)(2) of the Toxic Substances Control Act (TSCA) to compel the Environmental Protection Agency (EPA) to perform its non-discretionary duty to address the use and disposal of “legacy” asbestos in its risk evaluation for asbestos under TSCA section 6(b). Legacy asbestos was not included in the final risk evaluation for asbestos recently issued by the Trump EPA. This notice is being submitted on behalf of the following groups and individuals:

Asbestos Disease Awareness Organization
American Public Health Association
Center for Environmental Health
Environmental Information Association
Safer Chemicals Healthy Families - A Program of Toxic-Free Future
Vermont Public Interest Research Group
Barry Castleman, ScD
Arthur Frank, MD, PhD
Raja Flores, MD
Philip Landrigan, MD, MSc
Richard Lemen, PhD, MSPH
Celeste Monforton, DrPH, MPH

Since December 2016, EPA has been conducting a TSCA risk evaluation on asbestos, a substance mined from mineral deposits that has killed hundreds of thousands of Americans. Under section 6(b)(4)(G) of TSCA, EPA was required to complete this evaluation by June 19, 2020.

Asbestos is no longer mined in the US but is now imported in bulk and as part of several asbestos-containing products. In addition to these ongoing commercial uses, asbestos was widely

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distributed and sold for several decades as part of construction materials such as attic insulation, pipes, boilers, floor tiles, gaskets, shingles, siding and roofing. These asbestos-containing building materials remain in use in millions of structures across the US, including schools, factories, public buildings, commercial businesses, apartment buildings and residences.

When it began its asbestos risk evaluation, the Trump EPA claimed that the risks of legacy asbestos to millions of workers, consumers, school children and teachers were beyond its authority under TSCA. As a result, it excluded legacy asbestos from its risk evaluation. However, EPA's interpretation of the statute was squarely rejected by the U.S. Court of Appeals for the Ninth Circuit. In its November 14, 2019 decision, the Ninth Circuit held that the ongoing use and disposal of chemicals no longer distributed in commerce are "conditions of use" as defined in section 3(4) of TSCA and must be included in TSCA risk evaluations.

The Trump EPA issued its final risk evaluation (FRE) for asbestos on December 30, 2020 and announced its availability in the Federal Register on January 4, 2021. 86 Federal Register 89. Described by EPA as a "Part 1" evaluation, the FRE did not address numerous aspects of asbestos exposure and risk, including the health impacts of legacy asbestos uses and associated disposal. The Agency stated its intent to conduct a future "Part 2" evaluation focused on legacy asbestos but provided no specifics about how it would be conducted and failed to set a schedule for completing it.

Thus, EPA failed to complete a full asbestos risk evaluation in accordance with TSCA by the June 19, 2020 deadline in the law. Because the asbestos evaluation was required to assess the risks to human health of the use and disposal of legacy asbestos under TSCA as construed by the Ninth Circuit, EPA is in violation of a non-discretionary duty under section 20(a)(2).

As required by 40 CFR § 702.62(b), the details of the Agency's failure to perform non-discretionary acts and duties are described below:

(1). Specific TSCA Provisions Requiring Non-Discretionary Acts and Duties. TSCA section 6(b)(4)(A) provides that the "Administrator *shall* conduct risk evaluations . . . to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment . . . *under the conditions of use*" (emphasis added). Under TSCA section 3(4), the term "conditions of use" means "the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of." Section 6(b)(4)(G) of TSCA provides that EPA "*shall* complete a risk evaluation . . . not later than 3 years after the date on which [it] initiates the risk evaluation" (emphasis added). The Agency "may extend the deadline for a risk evaluation for not more than 6 months."

(2). Actions by the Trump EPA Alleged to Constitute the Failure to Perform a Non-discretionary Act and Duty. The Administrator is in violation of his non-discretionary duty under TSCA section 6(b) to complete the asbestos risk evaluation by June 19, 2020 because she failed to include the use and disposal of "legacy" asbestos in the FRE.

Exclusion of Legacy Asbestos from the FRE. TSCA, the principal federal law for managing chemical risks, was comprehensively amended by Congress in 2016. The amendments established a new process for conducting risk assessments on chemicals of concern to determine whether they present unreasonable risks to human health and the environment. Under section 6(b)(4)(A), these determinations of risk must be “under the conditions of use” of a chemical. A new term in the law, “conditions of use” is defined broadly in section 3(4) to encompass all the “circumstances . . . under which a chemical substance . . . is known . . . to be manufactured, processed, distributed in commerce, used or disposed of.”

TSCA section 6(b)(2)(A) requires EPA to select 10 chemicals to undergo risk evaluations and to initiate these evaluations within 180 days of the enactment of the amended law. These 10 chemicals, announced by EPA in December 2016, included asbestos. 81 Federal Register 91927 (December 19, 2016). As EPA began work on the 10 chemicals, it issued a “framework” rule in July 2017 establishing the approach it would follow in conducting risk evaluations. The preamble to the rule stated that EPA did not consider “legacy activities”—consisting of “legacy uses,” “associated disposals,” and “legacy disposals”—to be TSCA conditions of use. 82 Fed. Reg. 33726, 33729–30 (July 20, 2017). It defined the term “legacy uses” as “the circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution.” *Id.*

EPA relied on this interpretation to exclude legacy activities from its asbestos risk evaluation. In its June 2017 [scoping document](#), EPA stated that, “[i]n the case of asbestos, legacy uses and associated and legacy disposals will be excluded from the scope of the risk evaluation.” It elaborated that this exclusion covered “asbestos-containing materials that remain in older buildings or are part of older products but for which manufacture, processing and distribution in commerce are not currently intended, known or reasonably foreseen.” EPA reaffirmed this exclusion in its May 2018 [problem formulation](#) for asbestos, explaining that it would not address “pre-existing materials currently in place within buildings (e.g., insulation materials, flooring, etc.) and also within pre-existing non-building equipment” because “[t]hese materials were installed in the past, and there is no evidence to suggest that manufacturing, processing, or distribution for such activities is intended, known, or reasonably foreseen.”

Ninth Circuit Rejection of EPA Interpretation. In its November 14, 2019 decision, the Court of Appeals for the Ninth Circuit held “that EPA’s exclusion of legacy uses and associated disposals contradicts TSCA’s plain language.” *Safer Chemicals, Healthy Families v USEPA*, 943 F.3d 397, 421 (9th Cir. 2019). As it explained:

“EPA’s contention that TSCA can reasonably be read to refer to the future use of a product, and disposals associated with such use, *only* when the product will also be manufactured in the future for that use—and not when the product is no longer manufactured for the relevant use—is without merit. TSCA’s “conditions of use” definition plainly addresses conditions of use of chemical substances that will be used or disposed of in the future, regardless of whether the substances are still manufactured for the particular use.”

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Id at 424. The Court was well aware that its conclusion applied to asbestos, noting that “[f]or example, although asbestos is now infrequently used in making new insulation, it remains in place in previously installed insulation” (id. at 421) and that “future disposal of asbestos insulation . . . unambiguously falls within TSCA’s definition of ‘conditions of use’” (id. at 424).

Public Health Impact of Legacy Asbestos. There is a compelling public health need to include use and disposal of legacy asbestos in EPA’s asbestos risk evaluation. According to the recently published study entitled “Global Asbestos Disaster”, asbestos-related diseases cause nearly 40,000 deaths in the United States annually—more than double the previous estimates of 15,000 per year. Legacy asbestos is a major contributor to this death toll.

A wide range of asbestos-containing products—including attic and wall insulation, pipes and boilers, floor tiles, gaskets, roofing, shingles and siding and brake pads and linings—were distributed in commerce for several decades during the 20th century. Although sales started declining in the 1980s, these products were heavily used over several decades in constructing homes, schools, apartments, public buildings, offices, stores, and factories, remaining in place in millions of structures across the country. Much of this asbestos is in friable form and can be released into the air when disturbed during routine building maintenance and upkeep. Exposure can also occur when building materials are broken or torn apart during renovation, repair and demolition projects and the collection and removal of construction debris.

We know that the incidence of asbestos-related disease is elevated in populations with exposure to legacy asbestos. A study by NIOSH researchers examined cancer incidence and mortality among firefighters in San Francisco, Chicago, and Philadelphia and found that “the population of firefighters in the study had a rate of mesothelioma two times greater than the rate in the U.S. population as a whole.”¹ Studies have also found that school teachers, particularly in elementary and middle schools, are at higher risk of mesothelioma than the general population, due to the widespread presence of asbestos in schools built in the 1960s and 1970s and their poor record of asbestos abatement.² While OSHA standards apply to worker exposure to legacy asbestos, OSHA has recognized that these standards do not eliminate significant risks to workers.

Another source of widespread exposure is asbestos-containing debris that enters waste streams during building renovation and demolition. Asbestos waste continues to be generated and managed in the U.S. in significant quantities. According to reports submitted for the Toxic Release Inventory (TRI) in 2017, total asbestos releases for 2017 were 20,556,023 pounds, the bulk of which (92.8%) were on-site land releases.³ Because of limitations in the scope of TRI

¹ R. D. Daniels *et al.*, “Mortality and cancer incidence in a pooled cohort of US firefighters from San Francisco, Chicago and Philadelphia (1950-2009),” *Occupational and Environmental Medicine*, vol. 71, no. 6, pp. 388-397, Jun 2014.

² <https://www.inquirer.com/education/a/mesothelioma-philadelphia-school-district-lea-dirusso-cancer-20191121.html>

³ https://www.epa.gov/sites/production/files/2020-02/documents/2017_toxics_release_inventory_national_analysis_complete_report.pdf#:~:text=%20%20%20Title%20%20%202017%20Toxics,Created%20Date%20%20%202/26/2019%205:31:05%20PM.

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reporting, the quantity of asbestos waste generated is probably much larger. The movement of asbestos waste in commerce and poor waste management at landfills and construction sites are a significant danger to workers and the public.

No assessment of legacy asbestos exposure has been conducted in the last 35 years despite the ongoing contribution of this exposure to asbestos-related disease and death. The TSCA risk evaluation is a critical tool to update our understanding of the prevalence of legacy asbestos and the magnitude of exposure and risk it poses to the American public. Thus, in its review of the draft evaluation, the independent Science Advisory Committee on Chemicals (SACC) strongly recommended that EPA “[i]nclude legacy and aggregate asbestos exposures in the calculation of cancer risk estimates.”⁴

Trump EPA Violations of Its Duties under TSCA. The exclusion of legacy asbestos use and disposal from the FRE is contrary to the plain language of TSCA. In section 6(b)(4)(A), Congress directed that EPA “*shall* conduct risk evaluations . . . to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment . . . *under the conditions of use*” (emphasis added). Under the Ninth Circuit decision holding that use and disposal of legacy asbestos are “conditions of use” as defined in TSCA, EPA has a non-discretionary obligation to determine whether these activities present an unreasonable risk of injury to human health and the environment.

TSCA prescribes clear deadlines for discharging this obligation. Section 6(b)(4)(G) provides that EPA “*shall* complete a risk evaluation . . . not later than 3 years after the date on which [it] initiates the risk evaluation” (emphasis added). The Agency “may extend the deadline for a risk evaluation for not more than 6 months.” With this extension, the deadline for completing the asbestos evaluation was June 19, 2020. By excluding use and disposal of legacy asbestos from the FRE, EPA is in violation of its non-discretionary duty under section 20(a)(2) to complete a full asbestos risk evaluation in accordance with TSCA by this deadline. .

(3). Citizens and Counsel Giving Notice

The citizens giving notice are:

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American Public Health Association (APHA)
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⁴ TSCA Science Advisory Committee on Chemicals Meeting Minutes and Final Report No. 2020-6 at 23.

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Respectfully submitted,

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